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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Unknown Party, et al.,  
10 Plaintiffs,  
11 v.  
12 GoDaddy.com LLC, et al.,  
13 Defendants.  
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No. CV-15-01768-PHX-DJH  
**ORDER**

15 On September 11, 2015, Plaintiffs John Doe 1, John Doe 2, and John Doe 3 filed a  
16 “Notice of Application and *Ex Parte* Application for Temporary Restraining Order  
17 [(“TRO”)] and an Order to Show Cause re: Preliminary Injunction[.]” Appl’n (Doc. 15)  
18 at 1:14-17 (emphasis omitted). This application is supported by the declaration of Karl S.  
19 Kroenenberger (Doc. 16), one of Plaintiffs’ attorneys, and the exhibits thereto (Doc. 16-  
20 1). As part of this application, Plaintiffs are seeking early discovery to identify the names  
21 of the three Roe defendants, whom have yet to be served with the complaint in this  
22 action.

23 **I. Background**

24 This lawsuit arises from the recent theft by anonymous hackers of massive  
25 amounts of private consumer data from the adultery website and dating service known as  
26 “Ashley Madison.” Plaintiffs allege that anonymous Defendants (identified in the  
27 complaint as John Roe 1, John Roe 2, and John Roe 3) (the “Roe Defendants”) acquired  
28 stolen confidential information from the anonymous hackers and then published that

1 information on websites which these Defendants own and operate. More specifically,  
2 defendant John Roe 1 allegedly owns and operates the websites located at  
3 “<ashleymadisonpowersearch.com>, and <adulterysearch.com>.” Co. (Doc. 1) at 4, ¶  
4 17. Defendant John Roe 2 allegedly owns and operates the website located at  
5 “<ashleymadisoninvestigations.com>.” (*Id.* at 4-5, ¶ 19). Defendant John Roe 3  
6 allegedly owns and operates the website located at “<greyhatpro.com>.” (*Id.* at 5, ¶ 20).  
7 Collectively, the Court will refer to these as the Roe websites.

8 Originally, Plaintiffs also named GoDaddy.com, LLC (“GoDaddy”) and Amazon  
9 Web Services, Inc. (“Amazon”) as defendants. Both are internet service providers  
10 (“ISPs”). *See* Co. (Doc. 1) at 4, ¶ 17. On September 11, 2015, Plaintiffs voluntarily  
11 dismissed without prejudice all claims against these ISPs. (Doc. 14). GoDaddy and  
12 Amazon “have represented . . . that they will comply with any orders of this Court  
13 concerning the Roe Defendants or the websites referenced in the Complaint.” (*Id.* at 2:5-  
14 7).

15 Plaintiffs challenge the Roe Defendants’ possession of Plaintiffs’ personal  
16 information, while knowing that the information had been stolen, and the Roe  
17 Defendants’ operation and hosting of the Roe Websites, which display that stolen  
18 information. Plaintiffs allege five separate causes of action. Plaintiffs allege, among  
19 others, that Defendants violated: (1) California Penal Code §496; (2) California Business  
20 & Professions Code §17200; and c) the Computer Fraud and Abuse Act (“CFAA”), 18  
21 U.S.C. §1030. Plaintiffs are seeking a TRO to essentially requiring the Roe Defendants  
22 to disable the Roe websites pending the resolution of this litigation. *See* Not. (Doc. 15) at  
23 18-19. Plaintiffs maintain that they will suffer irreparable harm if the Roe Websites  
24 remain publicly viewable, and that they have otherwise met the requirements for seeking  
25 a TRO.

26 In addition to seeking a TRO, Plaintiffs are seeking early discovery, of an  
27 unspecified nature, “for the limited purpose of identifying and serving the Roe  
28 Defendants.” Not. (Doc. 15) at 19:9. Employing the four part test adopted in *Columbia*

1 *Ins. Co. v. seescandy.com*, 185 F.R.D. 573 (N.D.Cal. 1999), Plaintiffs maintain that they  
 2 are entitled to such discovery. *See* Appl’n (Doc. 15) at 15-18. Finally, Plaintiffs are  
 3 seeking permission to electronically serve the Roe Defendants.

## 4 **II. Discussion**

### 5 **A. Early Discovery**

#### 6 **1. Governing Legal Standards**

7 Federal Rule of Civil Procedure 26(d)(1) prohibits discovery without a court order  
 8 prior to a Rule 26(f) conference between the parties. “[H]owever, in rare cases, courts  
 9 have made exceptions, permitting limited discovery to ensue after filing of the complaint  
 10 to permit the plaintiff to learn the identifying facts necessary to permit service on the  
 11 defendant.” *Columbia Ins.*, 185 F.R.D. at 577 (citing *Gillespie v. Civiletti*, 629 F.2d 637,  
 12 642 (9<sup>th</sup> Cir.1980)). Courts generally use a “good cause” standard to decide whether to  
 13 permit such early discovery. *See Semitool, Inc. v. Tokyo Electron America, Inc.*, 208  
 14 F.R.D. 273, 276 (N.D.Cal.2002) (adopting as the “appropriate standards under Rule  
 15 26(d)” the “more flexible good cause standard applied in *Yokohama Tire Corp. v.*  
 16 *Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 614 (D.Ariz. 2001) and other cases). “Good  
 17 cause may be found where the need for expedited discovery, in consideration of the  
 18 administration of justice, outweighs the prejudice of the responding party.” *Id.* at 276.

19 To determine whether there is good cause to allow early discovery to reveal  
 20 the identity of an unknown defendant, courts consider whether:

21 (1) the plaintiff can identify the missing party with sufficient  
 22 specificity such that the Court can determine that defendant is  
 23 a real person or entity who could be sued in federal court; (2)  
 24 the plaintiff has identified all previous steps taken to locate  
 25 the elusive defendant; (3) the plaintiff's suit against defendant  
 could withstand a motion to dismiss; and (4) the plaintiff has  
 demonstrated that there is a reasonable likelihood of being  
 able to identify the defendant through discovery such that  
 service of process would be possible.

26 *Columbia Ins.*, 185 F.R.D. at 578–80. This Court will briefly consider each of these  
 27 factors in turn.

#### 28 **2. Application**

**a. Identity of Missing Parties**

Attorney Kronenberger's declaration and the exhibits thereto, taken together, satisfy this Court that through early discovery Plaintiffs should be able to identify real people or entities associated with the Roe websites. *See* Aff. (Doc. 16) at ¶¶ 13-15, exhs. F-M (Doc. 16-1) at 19-51. The same also convinces this Court that the ISPs are in possession of account information associated with the Roe websites, and that such websites were created by persons, rather than by mechanical means. *See id.* at ¶¶ 24-25, exhs. S-T (Doc. 16-1) at 68-73. Although the Court is satisfied that early discovery may well reveal the identity of the Roe Defendants, it does not necessarily agree with Plaintiffs that ultimately these Defendants "would be subject to the jurisdiction of the Court." *See* Not. (Doc. 15) at 17:6-7. By the same token though, as discussed herein, at this very early stage in the litigation, Plaintiffs have sufficiently pled personal jurisdiction. Therefore, the first *Columbia Ins.* factor favors early discovery.

**b. Steps Taken to Locate Defendants**

Attorney Kronenberger's declaration also convinces this Court that he and his firm have diligently sought to identify the Roe Defendants prior to seeking Court intervention, and that there are no other means available for identification short of such intervention. *See* Aff. (Doc. 16) at 7, ¶ 26. Therefore, the second *Columbia Ins.* factor also favors early discovery.

**c. Withstanding Motion to Dismiss**

The third *Columbia Ins.* factor requires the Court to consider with Plaintiffs' action could survive a motion to dismiss. Such a showing is necessary "to prevent abuse of this extraordinary application of the discovery process and to ensure that plaintiff has standing to pursue an action against defendant." *Columbia Ins.*, 185 F.R.D. at 579-580 (citation omitted). Among other claims, Plaintiffs allege that Defendants violated the CFAA. As outlined in Plaintiffs' Application, it appears that they could survive a motion to dismiss as to such claim. *See* Not. (Doc. 15) at 11-12. Because the Court is persuaded that Plaintiffs have sufficiently alleged a CFAA claim, it need not determine at this

1 juncture whether Plaintiffs' other four causes of action could also withstand a motion to  
 2 dismiss. *See Dead Season LLC v. Doe 1*, 2013 WL 3805590, at \*5 n. 2 (citing cases).

3 Plaintiffs did not address the issue of whether they could withstand a motion to  
 4 dismiss based upon lack of personal jurisdiction. The complaint alleges that Defendants  
 5 "do substantial business in Arizona and purposefully direct substantial activities as [sic]  
 6 the residents of Arizona by means of the Internet services and websites described herein."  
 7 Co. (Doc. 1) at 3, ¶ 10. The complaint further alleges that "Defendants, and each of  
 8 them, have done substantial and continuous business with Arizona residents and have  
 9 purposefully directed substantial and pervasive activities at the residents of Arizona such  
 10 that each can and should reasonably expect to be haled into the courts of Arizona." (*Id.*).  
 11 Plaintiffs' attorney signed this complaint, thus attesting that the allegations therein  
 12 comport with Fed.R.Civ.P. 11. Therefore, based upon these good faith allegations, at this  
 13 early stage in the proceedings, it appears that Plaintiffs have alleged sufficient facts to  
 14 survive a motion to dismiss for lack of personal jurisdiction. Consequently, this factor  
 15 too favors early discovery.

#### 16 **d. Reasonable Likelihood of Identification**

17 The final *Columbia Ins.* factor pertains to whether the discovery sought will reveal  
 18 the identities of the unknown Defendants. *AF Holdings LLC v. Does 1-96*, 2011 WL  
 19 5864174, at \* 4 (N.D.Cal. Nov. 22, 2011) (citing, *inter alia*, *Gillespie*, 629 F.2d at 642–  
 20 43 (stating that early discovery to identify doe defendants should be allowed "unless it is  
 21 clear that discovery would not uncover the identities"). The record as presently  
 22 constituted persuades this Court that there is a reasonable likelihood that through early  
 23 discovery Plaintiffs will be able to identify the Roe Defendants to allow for service of  
 24 process. Upon registering a domain name or hosting a website, the ISPs require account  
 25 holders to provide personal contact information, such as names and addresses. *See Aff.*  
 26 (Doc. 16) at 6, ¶¶ 24-25, exh. S (Doc. 16-1) at 68-69 and exh. T (Doc. 16-1) at 71-73.  
 27 Therefore, there is a strong likelihood that the ISPs will possess such identifying  
 28 information for the Roe Defendants. Moreover, if limited discovery to reveal the

1 identities of the Roe Defendants is not allowed, Plaintiffs could not proceed with this  
2 lawsuit.

3 In short, because it is not “clear that discovery would not uncover the identities”  
4 of the unknown Defendants, and because it is also not clear “that the complaint would be  
5 dismissed on other grounds[.]” Plaintiffs will be allowed to proceed with early discovery  
6 to determine the identities of the Roe Defendants. *See Dallas Buyers Club, Inc. v. Doe-*  
7 *75,81.191.27*, 2015 WL 5155844, at \*1 (S.D.Cal. Sept. 2, 2015) (quoting *Gillespie*, 629  
8 F.2d at 642). This is in keeping with a district court’s discretion “to grant discovery to  
9 determine jurisdictional facts[.]” *Columbia Ins.*, 185 F.R.D. at 578 (citing *Wells Fargo &*  
10 *Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n. 24 (9<sup>th</sup> Cir. 1977)).

11 In granting this request, the Court is keenly aware that it must consider possible  
12 prejudice to the Roe Defendants. *See Semitool*, 208 F.R.D. at 276. To minimize any  
13 potential prejudice to the Roe Defendants, while at the same time balancing the Plaintiffs’  
14 right to pursue this lawsuit, the Court is narrowly tailoring the allowable discovery. At  
15 this juncture, Plaintiffs shall be allowed to obtain through ISPs, GoDaddy and Amazon,  
16 only the names, addresses and e-mail addresses of the Roe Defendants.

### 17 **B. Electronic Service**

18 Plaintiffs further seek permission to serve the TRO on the Roe Defendants  
19 “through electronic means reasonably calculated to reach” them. Not. (Doc. 15) at 18:16  
20 (emphasis omitted). Service by this means is necessary, Plaintiffs contend, because  
21 without the names and addresses of the Roe Defendants, obviously Plaintiffs cannot  
22 effectuate personal service. The Court agrees, and thus in the exercise of its discretion  
23 allows Plaintiffs to electronically serve a copy of this Order.

### 24 **C. Temporary Restraining Order**

25 Adopting the *Columbia Ins.* rationale, this Court “will not grant a temporary  
26 restraining order against [the Roe] defendants at this time because such a ruling would be  
27 futile.” *See Columbia Ins.*, 185 F.R.D. at 577. “Plaintiff[s] ha[ve] not been able to  
28 collect the information necessary to serve the complaint on [these] defendants. As a result

any temporary restraining order issued could only be in effect for a limited time and would be unlikely to have any effect on defendant[s] whom plaintiff[s] has not yet located.” *Id.* Furthermore, “[o]nce the order expired plaintiff[s] would be unable to obtain a preliminary injunction because such relief cannot be imposed *ex parte*[,]” except under very limited circumstances which have not been shown on this record. *Id.* In other words, to facilitate the orderly administration of justice, the Court denies without prejudice to renew Plaintiffs’ application for a TRO.

### III. Conclusion

Accordingly,

**IT IS ORDERED DENYING** without prejudice to renew Plaintiff’s Notice and *Ex Parte* Application for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction (Doc. 15), except insofar as Plaintiffs are seeking early discovery and service by electronic means;

**IT IS FURTHER ORDERED** that Plaintiffs shall be allowed to conduct early discovery as follows:

1. Plaintiffs may immediately serve a subpoena, pursuant to Fed.R.Civ.P. 45, to Internet Services Providers GoDaddy.com, LLC and Amazon Web Services, Inc. to identify only the names, addresses and e-mail addresses of the Defendants John Roe 1-3, allegedly the owners/operators of the following websites: (1) <ashleymadisonpowersearch.com> and <adulterysearch.com>; <ashleymadisoninvestigations.com>; and <greyhatpro.com>. Plaintiffs shall serve a copy of this Order with any subpoenas served upon the ISPs identified above.

2. To the extent an entity served with a subpoena or other discovery request pursuant to this Order is a cable operator as that term is defined in 47 U.S.C. §522(5), that entity is authorized to disclose the subscriber’s personally identifiable information to the extent such disclosure is necessary to comply with the subpoena or other discovery request, pursuant to 47 U.S.C. §551(c)(2)(B).

3. Within **seven (7) calendar days** after service of the subpoenas, the ISPs shall


1 notify the Defendants John Roe 1-3, as described in paragraph (1) above, that their  
2 identities are sought by Plaintiffs and shall provide such Defendants with a copy of this  
3 Order. The ISPs shall preserve the information sought by Plaintiffs in the subpoenas.

4 4. Any information disclosed to Plaintiffs in response to the subpoenas issued in  
5 accordance with paragraph one (1) may not be used for any improper purpose and may  
6 only be used to pursue this litigation.

7 5. No other discovery is authorized at this time.

8 **IT IS FINALLY ORDERED** that, because Defendants' identities are presently  
9 unknown, Plaintiffs may serve this Order upon Defendants through electronic means that  
10 are reasonably calculated to reach Defendants, such as email addresses or "Contact Us"  
11 submission portals provided on Defendants' websites.

12 **Dated** this 16th day of September, 2015.

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16 Honorable Diane J. Humetewa  
17 United States District Judge  
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